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No. 87-128

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

ARTHUR E. POSTEL,

Petitioner,

v.

THE TEXAS WATER DEVELOPMENT BOARD, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Question for Review is whether Petitioner's case was properly dismissed for failure to state a claim upon which relief could be granted.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case represents Petitioner's third unsuccessful attempt to recover for what he alleges was Respondents' "official malignment" of him and their purported violations of the Texas Constitution in the manner in which the Texas Water Development Fund is administered. His first such suit was filed in 1970 and resulted in the United States District Court's dismissal of Respondent Texas Water Development Board for lack of jurisdiction and the granting of summary judgment in favor of its members and employees. That decision was affirmed by the United States Court of Appeals for the Fifth Circuit in 1973. *Postel v. Franklin County Water District, et al.*, 470 F.2d 189 (5th Cir. 1972). Later that same year, Petitioner filed suit in the District Court of Travis County, Texas against, *inter alia*, the individual members of the Texas Water Development Board. Petitioner non-suited that action in 1974.

The basis of the previous lawsuits and the present action are the same. Petitioner continues to allege that *in 1969* members

of the Texas Water Development Board conspired and maligned him for expressing his opposition to the then-proposed Texas Water Plan, an opposition based upon what he continues to allege is the extra-constitutional manner in which the Texas Water Development Board administers the Water Development Fund. The only differences between this and the previous lawsuits are the substitution of the Attorney General of Texas for the Franklin County Water District in the role of co-conspirator and the substitution of the Guaranty Clause for the First Amendment as the legal basis for the suit.

The end result of this lawsuit before the District Court was also the same as the others: Petitioner lost. Since he grounded this lawsuit solely on the Guaranty Clause, the District Court dismissed for failure to state a claim upon which relief could be granted.[1] The United States Court of Appeals for the Fifth Circuit affirmed the District Court's dismissal and rationale in an unpublished opinion. Petitioner now seeks this Court's review of that decision.

SUMMARY OF ARGUMENT

No writ should be granted because this case does not merit Supreme Court review. The Fifth Circuit ruled correctly in affirming the District Court. This Court has long and wisely held that claims under the Guaranty Clause are nonjusticiable.

REASONS THE WRIT SHOULD BE DENIED

I. The writ should be denied because this is not a special or important case.

First and foremost among the several reasons why the petition should be denied is that there are no special and important reasons for granting it. The decisions of the courts below fit none of the measures of character set out in Sup. Ct. R. 17.1. It is worth noting that neither the District Court nor the Court of Appeals viewed this case as worthy of publication. The im-

1. Also pending at the time of dismissal was Defendant's Motion to Dismiss for Want of Subject Matter Jurisdiction and Motion for Summary Judgment. Should a writ be granted in this case, Respondents would urge affirmance on the alternative grounds raised therein.

port of the Court of Appeals' determination not to publish its opinion is that it not only has no precedential value and merely settles a particular case on the basis of well-settled principles of law, but also that publication imposes needless expense on the public and burdens on the legal profession. 5th Cir. Loc. R. 47.5. Other indicia of lack of special or important reasons for granting certiorari in this case include its placement on the summary calendar without oral argument and the issuance of a per curiam opinion from a distinguished panel. 5th Cir. Loc. R. 34.2.

II. The writ should be denied because Petitioner failed to state a claim upon which relief could be granted.

In bringing his suit it appears that Petitioner has attempted to put into action an idea proposed by a student note in the Yale Law Journal. Note, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, 93 Yale L.J. 561 (1984). That note argues for federal judicial review of the conformance of state officials to state law under the Guaranty Clause, U.S. CONST. art. IV, §4, as a measure to "secure the 'rule of law'." *Id.* Both as a matter of legal precedent and as unwise legal policy, that notion should be rejected.

A. Years of legal precedent indicate that no cause of action exists under the Guaranty Clause.

The issue of the existence of a cause of action under the Guaranty Clause is not new, and both Petitioner's brief and the note which sparked it recognize that no court has yet held that such a cause of action exists. (Petition, pp. 16-26; note, 93 Yale L.J. at 562.) What Petitioner characterized as a "judicial myth" is in fact a long and unbroken line of Supreme Court cases extending back to 1849 and the decision in *Luther v. Borden*, 7 How. 1 (1849). *See Baker v. Carr*, 369 U.S. 186, 218-226 (1962) (collecting cases).

Petitioner's attempts to distinguish his claim from those earlier cases and to craft an exception out of the political question analysis of *Baker v. Carr*, 369 U.S. 186, are of no avail. The criteria and formulations Petitioner lifts from *Baker*, 369 U.S. at 217, are those describing "political questions" in a context other than Guaranty Clause claims. *Baker* analyzed Guaranty

Clause claims separately from other "political questions," *Id.* at 218-226, and held that although none of the formulations describing political questions was present in that case, any Guaranty Clause claims would have been futile. *Id.* at 227. *Baker* recognized that "the Court has consistently held that a challenge to state action based on the Guaranty Clause presents no justiciable question." *Id.* at 224.

The first case cited by the Court in *Baker* for the proposition that the Guaranty Clause is not the source of a constitutional standard for invalidating state action is *Taylor v. Beckham*, 178 U.S. 548 (1900). That case sought Supreme Court review of a contested election in Kentucky, arguing that the actions of the Kentucky legislature (and courts) in resolving an election contest violated its constitution and thus deprived the petitioners of a republican form of government. The Court refused to consider the Guaranty Clause claims, holding them nonjusticiable. *Id.* at 580.

Petitioner is seeking to do that which is foreclosed by those cases. As in *Taylor*, he wishes a federal court to review the activities of a state government for conformity with its own constitution, arguing that its failure to do so violates his right to a republican government. His case is exactly what *Baker* recognized as nonjusticiable — a challenge to state action based on the Guaranty Clause. Those challenges were rejected long ago, and Petitioner has demonstrated neither cases nor rationale for overruling that line of cases.

B. Wisdom also dictates that no cause of action exists under the Guaranty Clause.

Those cases which have held that no cause of action exists under the Guaranty Clause are not only supported by *stare decisis* and the judicial wisdom set out in those decisions, but their outcome is also dictated by other judicial policies. The policies reflected in the Eleventh Amendment, in the concept of "our federalism," and the doctrine of abstention, all support the underlying notion that the states, as sovereigns, are the best arbiters of their own laws and constitutions.

Petitioner's argued-for Guaranty Clause cause of action would stand federal-state relations, developed over the 200 years of American constitutional history, on their heads and impose federal judicial review of all state action for conformity with state constitutional law. Despite his disclaimers to the contrary, it is an attempt to bootstrap state law violations into federal constitutional claims.

Guaranty Clause claims are and should be nonjusticiable because there is no federal standard by which conformity to the provision can be judged. This is best illustrated by Petitioner's proposed *per se* standard. Whether called "abrogation" or "outlaw government," it concerns state law and nothing more. It cannot be a federal standard for determining whether the Clause has been violated because its parameters are controlled solely by the state, and those parameters can be as easily changed by conforming state law to state conduct (i.e., amending the state constitution) as by conforming state conduct to state law. In either case, the state action remains the same, yet Petitioner would contend that one violates the federal standard while the other does not.

Creation of a federal judicial standard for determining conformity with the Guaranty Clause is equally unpalatable. It could stifle the states' traditional role as the "laboratories of democracy" and impose a federal straitjacket over the diverse forms of state government. While the judiciary have historically fashioned constitutional standards for due process and equal protection, it has always been a function of the legislative branches or the people themselves to determine what particular forms their republican governments take.

Because federal judicial review would arise at the district court level, that review would be *de novo* and, as easily as not, independent of and unguided by any determination by the courts of the state whose constitution was allegedly violated. This idea runs smack into the jurisdictional bar of the Eleventh Amendment and this Court's recent ruling that the amendment precludes federal courts from granting relief against state defendants based on pendent state law claims. *Pennhurst State School and Hospital v. Halderman (Pennhurst II)*, 465 U.S. 89 (1984). It is impossible to reconcile denying federal courts

jurisdiction to consider and grant relief for state law violations appended to properly raised federal claims with granting them that same jurisdiction when Guaranty Clause claims are raised.

Creation of a Guaranty Clause cause of action is unnecessary and is also insulting to the judiciary of Texas. Texas has courts and it has judges. Those judges take an oath to defend the Constitution of the United States and the Constitution of the State of Texas. TEX.CONST. art. XVI, §1. These courts were created by the very constitution Petitioner alleges is being subverted and possess the powers thought necessary by the people of Texas to protect themselves against such subversion. Just as this Court has recognized that it is denigrating to assume that state court judges would ignore the supreme law of the land, *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 n. 3 (1985), it is even more denigrating to assume that they would ignore the very law which has created them. If Texas officials are violating the Texas Constitution, that is a matter for Texas to deal with. How, or even if, they are dealt with is not a matter for the federal judiciary. See *Taylor v. Beckham*, 20 S.Ct. at 902.

CONCLUSION

Because this case lacks any important issues for review but instead applied long and well-settled principles of constitutional law, the writ should be denied.

Respectfully submitted,

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